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Thomas Ben Vs. Parvathy Ommini

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Court : Kerala

Decided On : Mar-02-1961

Reported in : AIR1962Ker16

Judge : T.C. Raghavan, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 39, Rule 1

Appeal No. : Civil Revn. Petn. No. 319 of 1960

Appellant : Thomas Ben;parvathy Ommini

Respondent : Parvathy Ommini;thomas Ben

Advocate for Def. : S. Easwara Iyer, Adv.

Advocate for Pet/Ap. : G. Viswanatha Iyer, Adv.

Disposition : Revision allowed

Judgement :
ORDER

T.C. Raghavan, J.

1. The 5th defendant in a suit, which was stayed under Act I of 1957, is ths petitioner in the Civil Revision Petition and the revision arises out of an application by the plaintiff in the suit for injunction restraining the defendants from constructing

any building in the suit property. Before the trial court the 5th defendant gave an undertaking that the building he was constructing would he removed without raising any claim for compensation in case the plaintiffs established their claim to recover possession of the property and the learned Munsiff on the basis of this undertaking dismissed the petition for injunction. The plaintiffs took up the matter in appeal to ihe lower appellate court, which reversed the decision of the trial court and issued an injunction restraining the 5th defendant from putting up a building in the property pending suit. The 5th defendant questions the correctness of this decision of the lower appellate court.

2. The lower appellate court has relied on a decision of the Calcutta High Court in Israil v. Samset Rahman, AIR 1914 Cal 362 in support of its judgment. Since it involves a principle of law and the same is likely to arise frequently in our courts, I would quote an extract from the judgment and would consider its effect. The relevant passage at p. 363 reads :

'Under circumstances like these, the matter for consideration at this stage is, where does the balance of convenience lie; is it desirable that the status quo should be maintained or is it right that the defendants should be allowed to continue to alter the character of the land? It is well-settled that the court will not refuse an injunction in a case of this description so as to give the defendants an undue advantage over the plaintiffs. If the defendants in the case before us were allowed to proceed to the completion of the building which has been erected by them on the land, if is indisputable that they will be placed in a position ofundue advantage over the plaintiffs. In this connexion, reference may be made to the judgment of Sir George Jessel in the case of Aynsley v. Glover. (1874) 18 Eq 544, where that learned Judge observed as follows ; 'At all events this being an interlocutory application, let me continue my building, and I will undertake to pull down 'if the court shall ,so think fit', (the underlining (here into ' ') is mine). That is a very specious argument to address to the Court but one must have regard to the effect of allowing such a proceeding. Supposing a defendant erects a building at great cost, when he comes to the hearing ho will say to this Court; 'Compare the injury to me in pulling down the building, with the injury to the plaintiff in allowing the building to remain'. Ought or ought not the court to give weight to such a

representation? I think upon this point the observations of Vice Chancellor Kindersly, in the case of Curriers' Company v. Corbett, (1860) 2 Dr. and Sm. 355, are very important. The Vice-chan-cellor says : 'If the defendant's new buildings had not been completed, there would have been ground for interference by injunction; but as they have been completed, the question is, whether the Court ought to or would order the pulling down of the buildings or give compensation in damages.

The defendant's new buildings are of considerable magnitude and importance while the two houses of the plaintiffs are comparatively of small value and importance; and it has been decided, that in such a case, the Court will not as a matter of course, order the defendant to pull down his new buildings, but will give the party injured by the erection of those buildings compensation in damages. It appears to me that this is precisely one of such cases. Consequently, the learned Vice-Chancellor considered that the buildings being erected, the comparative values of the defendant's buildings and the plaintiff's were sufficient to induce him to refrain from granting an injunction in a case where, if the buildings had not been erected, he would have granted the injunction. If that is so, and if those considerations are to weigh with the Court upon the question of damages or injunction, I ought not to allow the defendant to proceed with his building, which will put him in such an advantageous position as regards the plaintiffs when the case comes to a hearing.'

Apparently the passage cited above supports the view taken by the learned Additional District Judge. But if the reasoning of the learned Judges disclosed in the aforesaid passage is looked at a little more closely, what emerges is that the reasoning docs not apply to the facts o the present case. As observed by the learned Judges the question is : where does the balance of convenience lie; is if better that the status quo should be maintained or is it more desirable that the defendant should be allowed to alter the character of the land? The undertaking that was contemplated by the aforesaid decision was an undertaking to pull down the building if the court should so think fit, which meant that the court in that case had still a discretion to decide at the time of hearing of the suit whether the party injured by the erection of those buildings should be paid compensation in

damages or the defendant should be directed to pull down his new building. In such a case, allowing the defendant to build on the land pending suit wouldmean putting him in an advantageous position as regards the plaintiff when the case comes to a hearing. In the present case the undertaking that was given in the lower court appears to be an unconditional one to pull down and remove the building without raising any claim for compensation in case the plaintiffs were found entitled to recover possession of the property. In such a case the question of putting the defendant in an advantageous position vis-a-vis the plaintiff does not arise and the court is not called upon to decide whether it thinks fit to direct the pulling down of the building.

3. In this view I am inclined to hold that the Calcutta decision has no application to the facts of the present case and therefore I hold that the decision of the lower appellate court is net correct. But, now that Act I of 1957 has been repealed and the stay of the suit has been vacated, I do not consider it proper to straightway restore the order of the trial court. Therefore I allow the Civil Revision Petition and direct the lower court to consider the question afresh under the present circumstances. The suit being an old one I direct the lower court to dispose of the same within four months of the receipt of the records by it. The lower court will consider in disposing of the petition for injunction whether it will accord with balance of convenience to issue an order of injunction or not in view of the fact that the suit is to be disposed of within four months and also in view of the new legislation, regarding Agrarian Relations. The parties will bear their respective costs.

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